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## Prohibition's Hangover: How Antiquated Illinois Beer-Law is Abused by Big Beer to the Substantial Detriment of Craft Breweries

Ryan R. Lee

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# Prohibition’s Hangover: How Antiquated Illinois Beer-Law is Abused by Big Beer to the Substantial Detriment of Craft Breweries

RYAN R. LEE\*

*The explosion of the craft beer industry in recent decades has revealed how antiquated the laws relating to beer in Illinois have become. Shaped primarily by the Liquor Control Act of 1934, the Beer Industry Fair Dealing Act, the mandatory three-tier distribution system, and the inadequate policing power of the Illinois Liquor Control Commission; the Illinois beer-law landscape allows big beer to abuse the system to the substantial detriment of craft breweries. These regulations and deficiencies prohibit craft breweries from growing to their full potential and encourage craft brewers to either relocate out of, or outright refuse to do business in, Illinois. While more craft-friendly legislation has gradually been implemented, Illinois needs to quickly rectify the issues with its beer-law or continue to lose substantial revenue to other states that are more conducive to the success of craft brewers.*

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## I. INTRODUCTION

Water, hops, malt, and yeast—on its face, beer is a pretty simple, innocuous beverage.<sup>1</sup> Ranging from a “faceless, industrial commodity” to an “artistic creation as treasured and transfixing as the finest wine,” it is known by those hip to beer culture to be anything but simple.<sup>2</sup> It has played an integral part in our nation’s history, stimulating industry, shaping our Constitution, and treating taste buds to an experience unlike any other.<sup>3</sup> First, it is crucial to note—craft beer is not the nondescript, fizzy, industrial lagers made to be gulped ice-cold.<sup>4</sup> Craft beer is meticulously brewed to be flavorful and memorable—in relating his first experience with craft beer, Ken Grossman of Sierra Nevada Brewing Company recalls being “overwhelmed by the beer’s intensity and balance,” as he “hadn’t tasted anything quite like it before.”<sup>5</sup> Craft brewing has been around at least to some degree for the past thirty to forty years,<sup>6</sup> though the “craft beer revolution” that we are now living in has only recently exploded on the scene, bringing with it problematic legal issues.

Beer has historically been heavily regulated by governments, and the laws have always been draconian to various degrees. Ranging from unscrupulous ale-wives being drowned per the Code of Hammurabi to current craft brewers being drowned by regulations in the River of Antiquated Beer Laws, beer has always had a tumultuous relationship with the legal system.<sup>7</sup> Indeed—“Beer is a great mirror of history. . . . [E]very aspect of this malty,

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1. Greg Koch, Steve Wagner & Randy Clemens, *THE CRAFT OF STONE BREWING CO.: LIQUID LORE, EPIC RECIPES, AND UNABASHED ARROGANCE* 7 (2011).

2. RANDY MOSHER, *TASTING BEER: AN INSIDER’S GUIDE TO THE WORLD’S GREATEST DRINK* 1 (Margaret Sutherland et al. eds., 2009).

3. KOCH ET AL., *supra* note 1, at 21.

4. Greg Koch frequently, and aptly, refers to mass-produced beer as “watery flavorless fizzy [and] yellow.” KOCH ET AL., *supra* note 1, at 26.

5. KEN GROSSMAN, *BEYOND THE PALE: THE STORY OF SIERRA NEVADA BREWING CO.* 34 (2013).

6. KOCH ET AL., *supra* note 1, at 25.

7. MOSHER, *supra* note 2, at 26; W.W. DAVIES, *THE CODES OF HAMMURABI AND MOSES WITH COPIOUS COMMENTS, INDEX, AND BIBLE REFERENCES* 53 (citing Rule 108 of the

hoppy, foamy brew is a consequence of a remarkable chain of events that began some ten thousand years ago.”<sup>8</sup>

The current Illinois beer-scene is largely a result of the Three Tier Distribution System, a feature of the Illinois Liquor Control Act of 1934.<sup>9</sup> This system prevents “tied-houses,”<sup>10</sup> an old system of beer distribution at odds with American temperance. In the era immediately following Prohibition, this system was effective for protecting distributors—as so few brewers survived the failed experiment of Prohibition, those who existed quickly became immensely powerful.<sup>11</sup> However, this power differential has switched in recent decades—no longer are breweries multigenerational, multimillion-dollar companies.<sup>12</sup> Rather, they are small, family-run businesses proudly managed by their owners and founders.<sup>13</sup> As such, the Three Tier Distribution System now is in conflict with the brewers—by putting immense power in the hands of the distributors, craft brewers are drowning because of the law. This power differential allows large breweries to abuse and cheat the system, effectively making Illinois a hostile environment for small craft brewers.

Recent legislation, such as increasing the limit of barrels a brewery may brew and still self-distribute, has formed a temporary solution to the issues.<sup>14</sup> Craft brewers are rapidly growing, and will only continue to do so as beer-

Code of Hammurabi: “If a [female] tavern-keeper do [sic] not accept grain according to gross weight as pay for drinks . . . she shall be convicted and thrown into the water”).

8. MOSHER, *supra* note 2, at 27.

9. *See generally* 235 ILL. COMP. STAT. 5/6-1.5 (2014).

10. A tied-house is an establishment that sells liquor while the establishment is owned by the manufacturer of said liquor. *E.g.*, Tim Heffernan, *Last Call*, WASH. MONTHLY (Dec. 2012), [http://www.washingtonmonthly.com/magazine/november\\_december\\_2012/features/last\\_call041131.php?page=all](http://www.washingtonmonthly.com/magazine/november_december_2012/features/last_call041131.php?page=all).

11. After Prohibition, only around one hundred breweries persisted beyond the middle of the twentieth century. *See* MOSHER, *supra* note 2, at 21-22.

12. In fact, this dynamic has inverted completely—not only are breweries now predominantly small, family-run businesses, but distributorships are owned by immensely wealthy and powerful individuals. Furthermore, just three distributors control over two-thirds of the Chicago beer-market. *See* James Ylisela Jr., David Sterrett & Kate MacArthur, *Pay-to-Play Infects Chicago Beer Market, Crain’s Investigation Finds*, CRAIN’S CHI. BUS. (Nov. 20, 2010), <http://www.chicagobusiness.com/article/20101120/ISSUE01/311209986/pay-to-play-infects-chicago-beer-market-crains-investigation-finds> (containing a section on “Chicago’s Beer Barons,” discussing three of the most powerful owners of distributorships in Chicago).

13. For example, Two Brother’s Brewing Company was founded in 1996 by the eponymous brothers Jim and Jason Ebel. To this day, the company is still 100% family owned. *Two Brothers is Craft with a Conscience*, TWO BROTHERS ARTISAN BREWING (2016), <http://twobrothersbrewing.com/craft-with-a-conscience/> (hover mouse over “Family”) (last visited Dec. 21, 2016).

14. *E.g.*, Tom Johnson, *US Craft Brewers Raise Barrel Limit*, BREWERS’ GUARDIAN (Jan. 5, 2011, 9:46 AM), <http://www.brewersguardian.com/brewing-features/breweries/931.html>; Ray Latif, *Beer Production Limit for Illinois Craft Brewers Doubled*, BREWBOUND (Aug. 21, 2013, 5:23 PM), <http://www.brewbound.com/news/beer-production-limit-for-illinois-craft-brewers-doubled/>.

drinkers increasingly demand their product. The infamous treatment of Illinois beer laws has barred breweries from doing business in Illinois, driven other states' breweries out of the state, and even potentially caused a native Illinois brewer to elect to open a second brewery in a more reasonable state.<sup>15</sup> Current Illinois beer laws and their unreliable enforcement are costing the state jobs, revenue, and taxes.<sup>16</sup>

This Comment will go into more depth in explaining current Illinois beer laws, and how their original intent is no longer being served. Rather, the laws are now conducive to large breweries cheating their way to profits and creating a market hostile to consumer choice and the success of small businesses—the exact likes of which the laws are allegedly intended to prohibit. Furthermore, the system negatively impacts craft breweries by making it more difficult for them to thrive in the Illinois market by stymieing their growth, lest they grow beyond the boundaries allowed by law.<sup>17</sup> While some change has been enacted, more is needed, particularly in regards to enforcing beer laws.

## II. HISTORICAL CONTEXT

To understand the current beer-scene in America, it is important to place it in the proper historical context. The history of beer is nearly as expansive as the history of civilization.<sup>18</sup> From tales of beer preventing an ancient Egyptian goddess from destroying the world, to the famed *Reinheitsgebot* of Germany,<sup>19</sup> antiquity carries notes of beer throughout.<sup>20</sup>

To some extent, beer has been brewed in America since Europeans first arrived.<sup>21</sup> The story of craft-beer corruption in America never really began, though, until immigrants such as Adolphus Busch and the Schlitz brothers arrived in the mid-1800s, bringing their brewing know-how to America.<sup>22</sup>

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15. Ylisela et al., *supra* note 12, at 2-3. In 2014, St. Louis-based Schlafly Brewing wanted to open a brew pub in Chicago. However, due to Illinois laws, the brewery was unable to do so. Josh Noel, *Massive Growth in Illinois Craft Beer Predicted with New Law*, CHI. TRIB. (May 27, 2015, 5:18 PM), <http://www.chicagotribune.com/dining/ct-illinois-beer-law-20150527-story.html>.

16. The Illinois craft beer industry employed over seventeen thousand individuals and had an economic impact of over two trillion dollars in 2014. *Economic Impact*, BREWER'S ASS'N, <https://www.brewersassociation.org/statistics/economic-impact-data/> (last visited October 14, 2016) (click "Browse Data from all 50 states" link below United States map).

17. See 235 ILL. COMP. STAT. 5/5-1 (2014).

18. MOSHER, *supra* note 2, at 2.

19. The German beer purity law, enacted in 1516, permitted only water, malts, hops, and yeast to go into beer, and absolutely nothing else. MOSHER, *supra* note 2, at 48, 238.

20. MOSHER, *supra* note 2, at 8, 17.

21. MOSHER, *supra* note 2, at 19.

22. MOSHER, *supra* note 2, at 20.

Because refrigeration and transportation were in their infancy then, most beer was brewed and distributed locally.<sup>23</sup> Once pasteurization was invented, the beer world changed for the worse—the aforementioned master brewers were now able to distribute their beer far and wide, increasing profits as their markets expanded.<sup>24</sup> When brewers such as Schlitz and Coors began buying up all of their competition, it was the beginning of what is colloquially known as, and will be referred to throughout this Comment as, big beer—that is, (inter)national beer-brewing giants whose market and influence extends farther than any local brewery.<sup>25</sup> At the beginning of big beer’s existence in the 1870s, over four thousand breweries existed in America<sup>26</sup>—within forty years of buying up smaller breweries, that was down to less than one thousand six hundred.<sup>27</sup> Then on January 17, 1920, Congress issued its last call, and Prohibition began.<sup>28</sup>

This was, predictably, a crippling blow to breweries. Only the biggest were able to survive the failed experiment by producing soda, soft drinks, and “medicinal malt syrup.”<sup>29</sup> Within a year of Prohibition ending in 1933, less than eight hundred breweries existed; by the 1970s, only around one hundred were in operation.<sup>30</sup> However, this scenario was not inherently as grim as it sounds—one might argue that it opened the door for craft brewers. As Randy Mosher writes, “When we hit bottom in terms of brewery numbers and interesting beers in the late 1970s, we had nothing to save and nothing to keep us from reinventing beer as we saw fit.”<sup>31</sup> Fortunately, in what is often cited as the beginning of the craft beer revolution, Fritz Maytag started to do just that when he purchased the Steam Beer Brewing Company in 1965.<sup>32</sup> Soon, Maytag’s renamed Anchor Brewing Company was brewing full-flavored, shortcut-free beer, and the American beer landscape started its rise to glory.

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23. KOCH, *supra* note 1, at 23.

24. KOCH, *supra* note 1, at 23.

25. KOCH, *supra* note 1, at 26.

26. KOCH, *supra* note 1, at 23.

27. KOCH, *supra* note 1.

28. KOCH, *supra* note 1, at 23. The goals of Prohibition were “to reduce crime and corruption, solve social problems . . . and improve health and hygiene in America.” *See generally* Mark Thornton, *Alcohol Prohibition Was a Failure*, CATO INST. (July 17, 1991), <http://www.cato.org/publications/policy-analysis/alcohol-prohibition-was-failure>.

29. KOCH, *supra* note 1, at 24; *see also* Thornton, *supra* note 28 (providing an explanation of the term “failed experiment”).

30. MOSHER, *supra* note 2, at 21-22.

31. MOSHER, *supra* note 2, at 23.

32. MOSHER, *supra* note 2, at 25; *see also* GROSSMAN, *supra* note 5, at 33.

### III. ANTIQUATED BEER LAWS

#### A. THE THREE TIER DISTRIBUTION SYSTEM

The current Illinois beer scene is primarily influenced by 235 ILCS §5, which gave rise to the (in)famous Three Tier Distribution System. This system mandates inefficiency, dictating that there are three tiers to the Illinois beer market.<sup>33</sup> Tier one is the manufacturer or brewer,<sup>34</sup> tier two is the distributor,<sup>35</sup> and tier three is the retailer (liquor stores or bars).<sup>36</sup> The three tiers are only allowed to mix in very limited exceptions (such as the case with craft brewers and brewpubs).<sup>37</sup> The Three Tier Distribution System was conceived out of public policy concerns<sup>38</sup>—but exactly like how the current beer scene is different from what it was, the utility of the Three Tier Distribution System is now in substantial question. Both historically and currently, it is clear it is at odds with craft beer's goals.

##### 1. *History and Context of the Three Tier Distribution System*

The Three Tier Distribution System was enacted to protect Americans from “tied-houses.”<sup>39</sup> Tied-houses, common in Great Britain, are pubs that are owned by a brewery.<sup>40</sup> In tied-houses, the brewery is all three tiers of the distribution system—the brewer manufactures the beer, the brewer distributes the beer to the pub that the brewer owns, and the brewer sells the beer.<sup>41</sup> This allows the brewery to focus its efforts on making the house an inviting business, the likes of which small brewers simply cannot compete with, leading to little market competition.<sup>42</sup> While this system persists in Europe today, such quasi-monopolistic practices were being subjected to public scrutiny in America around the turn of the twentieth century.<sup>43</sup>

Tied-houses were problematic not only because of their detriment to consumer choice. By owning all three tiers of the beer distribution scheme, tied-houses were able to induce thirsty customers to stop by with prices as

33. Heffernan, *supra* note 10, at 3.

34. *The Three Tier System: It's What Works*, ASSOCIATED BEER DISTRIBS. ILL., <http://www.abdi.org/public/chart.htm> (last visited Sept. 23, 2016).

35. *Id.*

36. *Id.*

37. 235 ILL. COMP. STAT. 5/5-1 (2014).

38. The statute explicitly states that its purpose is “to protect the health, safety, and welfare of this State.” 235 ILL. COMP. STAT. 5/6-1.5 (2014).

39. See ASSOCIATED BEER DISTRIBS. ILL., *supra* note 34.

40. Heffernan, *supra* note 10, at 3.

41. Heffernan, *supra* note 10, at 3.

42. Heffernan, *supra* note 10, at 4-5.

43. See ASSOCIATED BEER DISTRIBS. ILL., *supra* note 34.

low as the owner saw fit, and these low alcohol prices frequently led to over-indulgence by patrons.<sup>44</sup> Furthermore, tied-houses were frequently used for illegal gambling and prostitution.<sup>45</sup> Finally, because tied-houses were allowed to exclusively stock their own lagers and ales, there was never a reason to offer beers from other brewers—so, a profusion of pubs appeared, each owned and sponsored by a different brewery.<sup>46</sup> With America moving towards a push to eliminate all alcohol consumption, this was especially problematic.<sup>47</sup>

After pasteurization and transportation allowed the beer-giants of Anheuser-Busch and friends to start buying up smaller breweries,<sup>48</sup> tied-houses became a very real threat to small American breweries. Once Prohibition struck, this issue of course became moot.<sup>49</sup> Once the Twenty-First Amendment ended Prohibition, liquor control was entrusted to individual states,<sup>50</sup> and at this point Illinois enacted the Illinois Liquor Control Act of 1934, formally establishing the Three Tier Distribution System.<sup>51</sup>

For a time, this was effective—by keeping large brewers *just* brewers, a more free market emerged. Once craft breweries entered the picture, though, the Three Tier Distribution System became a means of abuse. The disparity in size between big beer and craft brewers became problematic when big beer realized craft brewers were replacing them in bars.<sup>52</sup> So, big beer, with its immensely deep pockets, was able to buy its way back into bars.<sup>53</sup> Per the Illinois Liquor Control Act, manufacturers may not give anything of value to distributors or retailers—but, with enforcement difficult, big beer was able to bribe its way back into bars, kicking out small brewers.<sup>54</sup> This has had two effects—one, craft brewers are at the mercy of their distributors, and two, this has given Illinois (particularly Chicago<sup>55</sup>), a bad name—

44. Heffernan, *supra* note 10, at 4.

45. Heffernan, *supra* note 10, at 4.

46. Heffernan, *supra* note 10, at 4.

47. ASSOCIATED BEER DISTRIBS. ILL., *supra* note 34.

48. KOCH, *supra* note 1, at 23.

49. The issue of tied-houses was of course replaced by the issues that arose around the bootlegging industry, but that is beyond the purview of this Comment.

50. Specifically, states were given “the authority to regulate the production, importation, distribution, sale and consumption of alcohol beverages within their own borders.” ASSOCIATED BEER DISTRIBS. ILL., *supra* note 34.

51. See 235 ILL. COMP. STAT. 5/6-1.5 (2014).

52. Ylisela et al., *supra* note 12, at 1-3.

53. Ylisela et al., *supra* note 12, at 1-3.

54. Ylisela et al., *supra* note 12, at 1-3.

55. Greg Koch, of California’s Stone Brewing Company, stated in an interview that craft brewers “all know the reputation of Chicago,” mentioning “less-than-ethical wholesalers” who use “unethical methods for replacing handles.” In a testament to how passionate craft brewers are about their beer, Koch even went on the record as describing such practices as “f#@%\* bullshit.” *Industry Interview: Greg Koch of Stone Brewing Co.*, MOD. BREWERY AGE



New Glarus has stopped distributing there entirely,<sup>56</sup> and Local Option Beerworker of Chicago calls itself “a Crook County original.”<sup>57</sup>

The Three Tier Distribution System, while logical in its inception, is now one of many factors making Illinois an environment hostile to craft brewers. If reform does not happen soon, the Illinois beer scene might revert back to the big beer-dominated wasteland of the mid-twentieth century.

Ten years ago in the majority opinion for *Granholm v. Heald*, Justice Kennedy wrote, “that the three tier distribution system is unquestionably legitimate.”<sup>58</sup> *Granholm* was concerned with the constitutionality of laws that impacted liquor sales among states; due to discriminations against interstate commerce, the Dormant Commerce Clause<sup>59</sup> was implicated to rule the laws unconstitutional.<sup>60</sup> After this analysis, Justice Kennedy espoused the Three Tier Distribution System. However, his praise of the system was very myopic. Current American liquor laws *were* unquestionably legitimate in their inception—that is, immediately after Prohibition. However, the nation’s liquor-landscape has changed significantly over the past eighty years. Now, the Three Tier Distribution System perpetuates unnecessary harm to craft brewers on behalf of these “unquestionably legitimate” laws.

## 2. *The Abuses the Three Tier Distribution System Allows*

Deb Carey of Wisconsin’s New Glarus Brewing Company chose to leave Chicago because she “didn’t want to participate in illegal business practices,” in which “everyone has a hand out and everyone wants some cash.”<sup>61</sup> Another businessman said on the issue, “[i]f somebody did (talk), they’d have a death wish. They’d never work in a bar again.”<sup>62</sup> While these statements sound evocative of the vice and crime of Al Capone’s Chicago, they are much more recent descriptions of the impact the Three Tier Distribution System has on Illinois. Because of the Three Tier Distribution System, craft breweries are oftentimes edged out of the market, and big beer is allowed to continue to dominate, both via illicit and state-sanctioned means.

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5, <http://www.breweryage.com/tabloid/archive/emag/gregkoch.pdf> (last visited Oct. 16, 2016).

56. Ylisela et al., *supra* note 12, at 2.

57. See Local Option’s logo, either on their website, beer labels, or branded products/merchandise.

58. *Granholm v. Heald*, 544 U.S. 460, 489 (2005).

59. U.S. CONST. art. I, § 8.

60. *Granholm*, 544 U.S. at 492.

61. Ylisela et al., *supra* note 12, at 2.

62. Ylisela et al., *supra* note 12, at 2.

The Illinois Liquor Control Act of 1934 forbids manufacturers or distributors from giving “anything of value” to bars, with limited, narrow exceptions (typically related to advertising material such as signage).<sup>63</sup> This should mean that bars have no other motivation to distribute particular beers over others beyond the financial concerns of the bar and the enjoyment of their customers.<sup>64</sup> However, because of the system created by the Three Tier Distribution System, that does not seem to be the case. Stories are not uncommon of breweries with deep pockets installing taplines or other equipment, or throwing in free kegs of beer for every so many purchased, to win the allegiance of bar owners.<sup>65</sup> This can lead to bar owners believing that they have a contractual obligation to continue to support that brewer, even though a contract built on an illegal premise is not actually a contract.<sup>66</sup> Nevertheless, these beliefs can keep new beers out of bars. So, small craft brewers have a choice—they can either allocate their already limited resources to a venture that is illegal, immoral, and could revoke their brewing license if discovered,<sup>67</sup> or they can struggle along and find some other means into the market.

Fortunately, this is where the craft brewer self-distribution exception reveals itself to be a light in an otherwise dark market.<sup>68</sup> That is not to say that craft brewers still are not harmed by the “pay to play” scheme created by the Three Tier Distribution System. As already discussed, New Glarus caught wind of the vice perpetuated by the Three Tier Distribution System, and to this day still will not distribute in Illinois.<sup>69</sup> Additionally, the exception has its limits—currently, a craft brewer can distribute no more than one hundred and twenty thousand barrels of its beer while still remaining in the class receiving the exemption.<sup>70</sup> The implications of this are unfortunate—a brewer must either stay small in order to be allowed to self-distribute, or grow big enough to be thrown into the shark tank with big beer. Unfortunately, some

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63. 235 ILL. COMP. STAT. 5/6-5 (2014).

64. Greg Koch described brewers being paid fairly for their beer, which bars can then sell at reasonable profits to appreciative patrons as a “win-win-win”. *See* MOD. BREWERY AGE, *supra* note 55, at 6.

65. Big Beer “keep[s] out the independents by offering cash, new tap systems, free beer, and other incentives to tavern owners and retailers.” Ylisela et al., *supra* note 12, at 1.

66. RESTATEMENT (SECOND) OF CONTRACTS §§ 178-179 (1981).

67. The “revocation” of licenses is a common penalty for not following provisions of the Liquor Control Act. *See* 235 ILL. COMP. STAT. 5/6-3(a) (2014) (“[T]he State Commission or the local liquor control commissioner . . . shall . . . suspend or revoke the license, of any person, for any . . . violations of any tax Act administered by the Department . . . .”); 235 ILL. COMP. STAT. 5/6-5 (2014) (“The license of any person who violates any provision of this Section shall be subject to suspension or revocation . . . .”).

68. 235 ILL. COMP. STAT. 5/5-1 (2014).

69. Ylisela et al., *supra* note 10, at 2.

70. 235 ILL. COMP. STAT. 5/5-1(n) (2014).

breweries have already either been kept out of the state due to the unreasonable laws<sup>71</sup> or simply chosen to open branches in states with more beer-friendly laws rather than remain in Illinois.<sup>72</sup> So, not only has the Three Tier Distribution System induced out-of-state brewers to abandon or avoid Illinois, native breweries might well follow suit and take their hops, malt, water, and yeast elsewhere.

## B. THE BEER INDUSTRY FAIR DEALING ACT

The Beer Industry Fair Dealing Act is another example of the “unquestionably legitimate” Illinois beer laws that have ceased to be a good fit for the current beer scene.<sup>73</sup> When first passed, the Beer Industry Fair Dealing Act prevented many of the issues pertinent to 1980s beer culture—that is, protecting weak distributors from big, bad, deep-pocketed brewers. However, these heavily regulated relationships are now codified to enforce the power dynamic that leads to abuse.<sup>74</sup> Furthermore, looking at the Act’s legislative history shows that the intent of the drafters is no longer being met.

Up until the craft beer explosion in the late twentieth century, the American beer landscape was dominated by massive, international companies such as Anheuser-Busch.<sup>75</sup> These goliath breweries had many times the revenue and resources as any distributor at the time, and as “size equals power and thus control” in these relationships, brewers held immense power over the distributors that were statutorily required to defend temperance<sup>76</sup>. Issues such as delivering beer that the distributor did not order—but were still expected to pay for and sell—were common.<sup>77</sup> The Beer Industry Fair Dealing Act codifies what brewers may do with distributors and what distributors may do with brewers. However, the language used is very anti-brewery. The phrase

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71. Noel, *supra* note 15.

72. Philip Montoro, *New Proposed State Distribution Rules Would Choke the Growth of Chicago's Biggest Craft Brewers*, CHI. READER (May 26, 2014, 2:00 PM), <http://www.chicagoreader.com/Bleader/archives/2014/05/26/new-proposed-state-distribution-rules-would-choke-the-growth-of-chicagos-biggest-craft-brewers>.

73. *Granholm v. Heald*, 544 U.S. 460, 489 (2005).

74. *Id.*

75. MOSHER, *supra* note 2, at 23-24.

76. Barry Kurtz & Bryan H. Clements, *Beer Distribution Law as Compared to Traditional Franchise Law*, 33 FRANCHISE L.J. 397, 398 (2014).

77. 82d Ill. Gen. Assemb. Reg. Sess., Transcript of S. Deb. 130-131 (June 23, 1982) (statement of Sen. DeAngelis).

“No brewer shall” is prevalent throughout, making the entire act disproportionately protective of the distributor.<sup>78</sup> Contractual remedies offered for a slighted brewer are far fewer than the remedies for a slighted distributor.<sup>79</sup>

At its inception, the Beer Industry Fair Dealing Act was a “fair dealing bill,” enacted to ensure fair play in the market.<sup>80</sup> In the beer market of the 1980s, it was written for legitimate ends, and since then, has only had two amendments (the first dealing with contract revisions between brewers and distributors<sup>81</sup>, and the second only correcting grammatical issues with the statute).<sup>82</sup> This does not mean it was passed without qualms, however. Many of the concerns voiced by politicians during the Act’s formation were dismissed, so out-of-touch with the times did they seem.<sup>83</sup> However, these concerns are now valid and show that if the Act were to be debated today, it would be markedly different and better in tune with the current beer-scene.

From its inception, the Bill was being challenged by Anheuser-Busch, foreshadowing future issues.<sup>84</sup> At the time, though, this was simply glossed over.<sup>85</sup> Senator Bowman voiced concerns about the imbalance of power, notably how brewers are prohibited from price-fixing while no parallel limitation existed for distributors.<sup>86</sup> This was dismissed by the sponsor as “another issue” before moving on, similar to how these issues are still being dealt with today.<sup>87</sup>

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78. See 815 ILL. COMP. STAT. 720/5 (2014) (“Prohibited conduct. *No brewer* shall. . . .”); 815 ILL. COMP. STAT. 720/6(1-2) (2014) (“*No brewer* shall unreasonably withhold or delay its approval of any assignment. . . . [*No brewer* shall deny approval for any transfer. . . .”); 815 ILL. COMP. STAT. 720/7(1) (2014) (that describes only what “*any brewer*” may not do) (emphases added).

79. See generally 815 ILL. COMP. STAT. 720/5 (2014).

80. 82d Ill. Gen. Assemb. Reg. Sess., Transcript of H. Deb. 131 (May 3, 1982) (statement of Rep. Sandquist).

81. 815 ILL. COMP. STAT. 720/5 (2014).

82. *Id.*

83. After Representative Bowman voiced his concern that the bill prohibited no entity except the brewer from price fixing, Representative Stuffle simply replied “I think Representative [Bowman] has found a possible problem here” before taking further discussion of the bill out of the record. The record resumed with discussion on an entirely different bill, unrelated to the issue. See 82d Ill. Gen. Assemb. Reg. Sess., Transcript of H. Deb. 27 (May 3, 1982) (statement of Rep. Bowman and reply by Rep. Stuffle).

84. *Illinois Governor Signs HB 2606, Prohibiting Beermakers from Holding Distributor Interest*, BEERPULSE (June 14, 2013, 9:56 AM), <http://beerpulse.com/2013/06/illinois-governor-signs-hb-2606-prohibiting-beermakers-from-holding-distributor-interest/>.

85. 82d Ill. Gen. Assemb. Reg. Sess., Transcript of S. Deb. 24 (June 23, 1982) (statement of Sen. Stuffle).

86. 82d Ill. Gen. Assemb. Reg. Sess., Transcript of S. Deb. 26 (June 23, 1982) (statement of Sen. Bowman and reply by Sen. Stuffle).

87. The director of the Brewer’s Association stated recently that “[t]here may come a time when [a craft brewer] is coming up to [statutorily defined brew limits], and that’s for someone to figure out down the road.” Johnson, *supra* note 14.

Most significantly in the Senate debate, Senator Mahar was very vocal about how the Act is essentially a restriction on businesses, particularly (and most problematically) small businesses.<sup>88</sup> Others joined him in voicing their concerns that small, family-owned distributors would be unfairly impacted.<sup>89</sup> However, the perceived need to protect the franchises was perceived as more important, and the bill passed. Senator Bruce, who sponsored the bill, stated the aim of the bill was to “insure the small businessmen in this state who happen to be beer distributors are protected from brewers who might not treat them fairly.”<sup>90</sup> Broadening that language beyond the narrow scope of the debate, the Beer Industry Fair Dealing Act aims to ensure small businesses in Illinois, who happen to be in a certain tier of the Three Tier Distribution System, are protected from larger businesses in a different tier who might not be playing fairly. Applying that to the current beer scene, it becomes apparent—not only are the explicit goals of the Act not being served, but the fears expressed during its formation are now more relevant than ever. The fact that the Associated Beer Distributors of Illinois worked in tandem with brewers in getting the bill passed is irrelevant,<sup>91</sup> as all of the breweries that are now struggling with Illinois laws were not even in existence at that time.<sup>92</sup> Additionally, the fact that the distributors unanimously signed on makes sense, as the bill is very pro-distributor.<sup>93</sup>

The Beer Industry Fair Dealing Act persists largely because it is not inherently different from typical franchise laws that keep power balanced between franchisees and franchisors.<sup>94</sup> Looking at it that way, however, ignores the inherent difference between craft brewers and big beer—that is, strictly protecting the distributor’s rights in contracts is admirable when there is the possibility that they could be bullied by big beer, but the exact opposite is promoted when craft brewers are involved.<sup>95</sup> Franchise laws typically exist

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88. 82d Ill. Gen. Assemb. Reg. Sess., Transcript of S. Deb. 128 (June 23, 1982) (statement of Sen. Mahar).

89. 82d Ill. Gen. Assemb. Reg. Sess., Transcript of S. Deb. 128 (June 23, 1982) (statement of Sen. DeAngelis).

90. 82d Ill. Gen. Assemb. Reg. Sess., Transcript of S. Deb. 132 (June 23, 1982) (statement of Sen. Bruce).

91. *Id.* at 130.

92. Illinois’ oldest brewer is Goose Island, opened its first brewpub in Chicago in 1988, long after the time to influence the Beer Industry Fair Dealing Act had passed. *The State of American Craft Beer – Illinois*, AM. CRAFT BEER (Oct. 22, 2015), <http://americancraft-beer.com/item/the-state-of-american-craft-beer-illinois.html>.

93. 82d Ill. Gen. Assemb. Reg. Sess., Transcript of H. Deb. 24 (May 3, 1982) (statement of Rep. Stuffle).

94. Kurtz & Clements, *supra* note 76, at 409.

95. Andy Christon, *Franchise Laws and the Craft Brewer*, MOD. BREWERY AGE 11, <http://www.breweryage.com/tabloid/archive/emag/andychriston.pdf> (last visited Oct. 16, 2016).

because “franchisees have little power to negotiate favorable terms”<sup>96</sup> in contracts—if lack of negotiating power is the impetus for these regulations, it is clear regulations need to be written to protect and nurture craft brewers.

The Beer Industry Fair Dealing Act overlaps with the Three Tier Distribution System to further complicate the growth of craft brewers. Unless a craft brewer self-distributes, its only option for getting its product to market is through a distributor, per the Three Tier Distribution System.<sup>97</sup> The craft brewer would do well to carefully consider its decision to go with one distributor over another, because the Beer Industry Fair Dealing Act makes it notoriously difficult to get out of a contract with a distributor once entered.<sup>98</sup> So as to protect the distributor from big, bad, capricious brewers, a brewer may only cancel a contract with a distributor if the distributor fails to pay the brewer, dissolves, transfers ownership to creditors, or is convicted of violating the law or otherwise engaging in fraudulent conduct.<sup>99</sup> Otherwise, the brewer may only cancel the agreement after good faith attempts to cure or resolve the issue with the distributor.<sup>100</sup> On its face, this sounds in line with it being the “fair dealing bill” it was espoused to be during Senate debates.<sup>101</sup> However, the Act mandates that except in egregious (and difficult to prove) violations of the law, brewers must engage in legal battles with distributors to sever the contract. That is certainly feasible with big beer, the largest members of which have multi-billion-dollar budgets.<sup>102</sup> But quite simply, craft brewers have neither the legal manpower nor budgets to win disputes like that with distributors.<sup>103</sup>

The very real concern of craft brewers is that they get into a contract with a distributor who then loses interest in them or otherwise lacks the acumen to effectively market the brand.<sup>104</sup> If the craft brewer does not have an

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96. Kurtz & Clements, *supra* note 76, at 398.

97. *See generally* 235 ILL. COMP. STAT. 5/6 (2014).

98. *See generally* 815 ILL. COMP. STAT. 720 (2014).

99. 815 ILL. COMP. STAT. 720/3(3)(A-G) (2014).

100. 815 ILL. COMP. STAT. 720/4 (2014).

101. 82d Ill. Gen. Assemb. Reg. Sess., Transcript of H. Deb. 23 (May 3, 1982) (statement of Rep. Sandquist); 82d Ill. Gen. Assemb. Reg. Sess., Transcript of S. Deb. 131 (June 23, 1982) (statement of Sen. Gitz).

102. Last year, Anheuser-Busch InBev purchased SABMiller for \$107 billion, demonstrating the depth of its pockets. Antoine Gara, *Anheuser Busch Inbev Strikes Biggest-Ever Beer Deal With \$107B Takeover of SABMiller*, FORBES (Nov. 11, 2015, 7:23 AM), <http://www.forbes.com/sites/antoinegara/2015/11/11/anheuser-busch-inbev-strikes-biggest-ever-beer-deal-with-107b-sabmiller-takeover/#255e7527764b>.

103. Christon, *supra* note 95, at 13 (in which the author admonishes craft breweries that “[y]ou don’t have the big brewery legal departments and budgets to fight those kinds of battles with distributors, some of whom are larger than the largest craft brewer!”).

104. Christon, *supra* note 95, at 12 (“For many brewers the issue with franchising has . . . [included] ultimate desperation of being stuck, and sometimes virtually abandoned, in a distributor that has little interest in, or knowledge of how to handle specialty brands.”).

alternative means to distribute its product (such as a brewpub), it has a choice—either engage in crippling expensive litigation to escape the python-grip of the Act, or continue to brew for a distributor who has no interest in doing its job and getting the craft brew to market.<sup>105</sup> In an industry where even the smallest players have the capability to compete with the best around (if they can get distributed), having the fruit of their labor strangled in distribution can be crushing both financially and emotionally.<sup>106</sup> Add to that the fact that many craft breweries are family owned and operated, and this disappointment only increases.<sup>107</sup>

The Beer Industry Fair Dealing Act serves only as a stumbling block for aspiring craft brewers, and these challenges were foretold and ignored from the bill's inception.<sup>108</sup> A new Fair Dealing Act is needed to afford brewers protection from distributors just like the current Act protects distributors from brewers, or the Illinois Liquor Control Commission<sup>109</sup> needs to be more capable of enforcing the regulations. As it stands, the agency only employs twenty-four agents to monitor an estimated fifty-four thousand liquor licenses throughout the state.<sup>110</sup> And, with fines for violations rare, it is clear that current policing is inefficient, leading to the aforementioned issues stemming from the Beer Industry Fair Dealing Act.<sup>111</sup>

### C. THE LIQUOR CONTROL ACT OF 1934

In order to keep the three tiers of the beer industry separate, the Liquor Control Act of 1934 is very particular about what a brewer or distributor may provide to a retail location.<sup>112</sup> So as to prevent the outward appearance of a tied-house, advertising is especially regulated—a location may not have more than a statutorily-set amount of permanent outside signs, temporary inside signs, and temporary outside signs.<sup>113</sup> Furthermore, a brewer or distributor may not give “anything of value” to a retailer, be that something as small

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105. Christon, *supra* note 95, at 13.

106. TONY MAGEE, SO YOU WANT TO START A BREWERY?: THE LAGUNITAS STORY 28 (2014).

107. GROSSMAN, *supra* note 5, at 257.

108. 82d Ill. Gen. Assemb. Reg. Sess., Transcript of S. Deb. 131 (June 23, 1982) (statement of Sen. Gitz).

109. The Illinois Liquor Control Commission is the state entity charged with enforcing all Illinois Liquor Laws found in the Liquor Control Act of 1934. *What We Do*, ILL. LIQUOR CONTROL COMM'N, <http://www.illinois.gov/ilcc/about/Pages/What-We-Do.aspx> (last visited Jan. 27, 2016) [hereinafter *What We Do*].

110. ILL. LIQUOR CONTROL COMM'N, *infra* note 169.

111. An investigation by Crain's found that from 2000 to 2010, the Liquor Commission issued 406 fines for violations *state-wide*. Ylisela et al., *supra* note 12, at 4.

112. *See generally* 235 ILL. COMP. STAT. 5/6-5 (2014).

113. 235 ILL. COMP. STAT. 5/6-6(i-iv) (2014).

as free glassware or something as expensive as a brand-new refrigeration system.<sup>114</sup> This is to prevent an integration of the tiers, as that would effectively be “vertical integration of the three tiers, thereby creating a two-tier system which negates the purpose of the three-tier system.”<sup>115</sup> However, these prohibitions are what create such an easy opportunity for abuse. As *Crain’s* revealed, monetary kickbacks are easy to accomplish yet difficult to catch, as a brewer or distributor can simply set up different accounts to make tracking the money difficult.<sup>116</sup>

#### IV. RECENT DEVELOPMENTS IN BEER LAW

Until now, the term “craft brewer” has been used in the layman’s sense of the word—that is, any brewery that produces “craft beer,” something that has become a term of art in itself among beer-aficionados. However, “craft brewer” has been granted a legal definition much more concrete than the typical notion that a craft brewer must be “small, independent, and traditional.”<sup>117</sup>

A craft brewer is a brewer that holds a Class 10 brewer’s license, which permits the “manufacture of up to 930,000 gallons of beer per year.”<sup>118</sup> Compare that to big beer, such as Miller Coors, whose Class 3 brewing license does not set a ceiling for production.<sup>119</sup> The fact that a Class 3 license does not set a brewing limit, unlike a Class 10 license, makes it seem like the Class 3 would be an aspirational license for new breweries. However, there is a very important detail that goes along with the Class 10 license that makes craft brewers fight to keep their craft status—a brewer who holds a Class 10 license may also concurrently hold a Brewpub License, one of the few feathers allowed by law in the craft brewers’ cap.<sup>120</sup>

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114. 235 ILL. COMP. STAT. 5/6-5 (2014).

115. BEERPULSE, *supra* note 84.

116. Some tavern owners create separate accounts into which big beer purveyors can deposit their illegal incentives to carry their beer. Ylisela et al., *supra* note 12, at 8.

117. The Brewer’s Association defines craft breweries as small (having “[a]nnual production of 6 million barrels of beer or less”), independent (meaning that “[l]ess than 25 percent of the craft brewery is owned or controlled (or equivalent economic interest) by an alcoholic beverage industry member that is not itself a craft brewer”) and traditional (“[a] brewer that has a majority of its total beverage alcohol volume in beers whose flavor derives from traditional or innovative brewing ingredients and their fermentation”). See *Craft Brewer Defined*, BREWER’S ASS’N, <https://www.brewersassociation.org/statistics/craft-brewer-defined/> (last visited Oct. 16, 2016).

118. 235 ILL. COMP. STAT. 5/5-1 (2014).

119. *Id.*

120. 235 ILL. COMP. STAT. 5/5-1(n) (2014).



## A. BREWPUBS

Brewpubs are immensely beneficial to craft brewers for a few reasons. It gives craft brewers a community presence that is a critical advantage over big beer (“local” is a positive quality that fans often reference when discussing craft breweries<sup>121</sup>); it allows a craft brewer an opportunity to directly interact with its fan base; and—perhaps most critical of all—it permits a craft brewer to avoid the complications and pitfalls of having to enter into a contract with a distributor to get their beer to market. The brewpub license allows small brewers who wish to avoid the Beer Industry Fair Dealing Act’s intricacies to do so and focus their time and resources on what they do best—brew great beer without having to divert their attention to the Three Tier Distribution System.

Unfortunately, the omnipresent fear of Prohibition-era problems stunts the growth of brewpubs. In the eyes of some politicians, an establishment pouring its own ales and lagers runs perilously close to being a tied-house, the very entity that led to the Three Tier Distribution System in the first place.<sup>122</sup> So to continue to promote temperance, brewpubs are severely restricted as far as how much they may brew and distribute, and thus grow as a business.<sup>123</sup>

The definition of “craft brewer” has been changing relatively recently, but not nearly quickly enough. The growth of other states’ breweries such as Samuel Adams and Sierra Nevada led to the brewpub exception, along with increasing the ceiling of what “craft” means in 2011.<sup>124</sup> Since then, Illinois’s definition of “craft brewer” has risen from a brewer producing fifteen thousand barrels per year, to thirty thousand barrels per year in 2013,<sup>125</sup> to most recently 120,000 barrels in 2015.<sup>126</sup> While these increases make it sound as if lawmakers are aware of the issues with the limits, comparing the limit to how other states deal with craft brewers puts it in necessary contrast. Peter Crowley of Chicago’s Haymarket brewery pointed out last year that an out-of-state brewery is free to distribute a million barrels of beer in Illinois, but as a local brewer, he could only distribute up to Illinois’s maximum-allowed thirty thousand barrels before effectively being penalized by ceasing to be a

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121. Craft brewers are typically “very involved in their communities through philanthropy, product donations, volunteerism and sponsorship of events” as well as having “distinctive, individualistic approaches to connecting with their customers.” BREWER’S ASS’N, *supra* note 117.

122. Latif, *supra* note 14.

123. Latif, *supra* note 14.

124. Johnson, *supra* note 14.

125. Latif, *supra* note 14.

126. *Bill Passed Allowing Increased Illinois Beer Production*, ST. J.-REG. (June 9, 2015, 8:02 PM), <http://www.sj-r.com/article/20150609/NEWS/150609373>.

craft brewer. Then, he would not have a Class 10 license, and thus would not be allowed to operate a brewpub in Illinois.<sup>127</sup> Crowley will soon open a second Haymarket facility in Michigan—while no official reason is publicly available, the logical motivation that can be inferred is sobering. Illinois laws can give the impression that legislators “seem to want ways to crush craft beer production and in-state commerce.”<sup>128</sup>

## B. INCREASING THE BARREL-LIMIT

This is not to say that Illinois beer law has not changed to accommodate craft breweries. While baby-steps have been made to incrementally make Illinois friendlier to craft brewers, these changes are themselves problematic—namely, they too are moving too slow, and are still mired in Prohibition-era logic that ignores the exploitation of the system that is so rampant.<sup>129</sup>

The first pertinent change came about in 2011, when craft brewers were allowed to brew six million barrels of beer annually.<sup>130</sup> This change was because some breweries were approaching the craft-beer defining limit of two million barrels that had been statutorily set in 1976.<sup>131</sup> At the time the limit was raised to six million barrels, Paul Gatzka, director of the Brewers Association, stated “There may come a time when [a craft brewer] is coming up to six million barrels, and that’s for someone to figure out down the road.”<sup>132</sup> This statement shows what kind of myopic solutions are still being applied to the ongoing issue with beer laws.

Two years later, another temporary fix was implemented, this time in Illinois. HB 1573 was signed into law by then-governor Patrick Quinn.<sup>133</sup> This bill did not impact craft brewers’ ability to self-distribute or own a retail location, but rather doubled the amount of beer a craft brewer was allowed to brew.<sup>134</sup> This was not as large of an increase for which craft brewers had lobbied—again, Prohibition-era fears quashed this.<sup>135</sup> Bill Olson, President of the Associated Beer Distributors of Illinois, emphasized that the Three Tier Distribution System exists to prevent the likes of Anheuser-Busch and

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127. Montoro, *supra* note 72.

128. Montoro, *supra* note 72.

129. Latif, *supra* note 14.

130. Johnson, *supra* note 14.

131. Johnson, *supra* note 14.

132. Johnson, *supra* note 14.

133. Latif, *supra* note 14.

134. Latif, *supra* note 14.

135. Latif, *supra* note 14.

Coors from creating tied-houses, and to “prevent history from repeating itself.”<sup>136</sup> This is, of course, problematic, as it ignored the mob-era-style corruption that still persists in the beer industry, and that is perpetuated by inequalities born of the Three Tier Distribution System.<sup>137</sup>

Again in 2013, then-Governor Quinn signed HB 2606 into law as a result of a drawn-out legal battle involving Anheuser-Busch’s ownership of Illinois distributors.<sup>138</sup> The new law solidified the Three Tier Distribution System’s aims of preventing vertical integration and protecting the public (here, the phantoms of tied-house terrors still haunt), as well as promote the efficient collection of taxes.<sup>139</sup> Representative David Leitch emphasized the importance of protecting the three tier distribution system, as it “protects consumers from the threat of large brewers controlling distribution [...]—a means by which they can create a monopoly in the marketplace.”<sup>140</sup> This law, again, carries with it the faults inherent in Illinois liquor laws—that is, being shaped by antiquated phantasms while ignoring the vice and corruption propagated by current policies.

Finally, in 2015, the brew limit was again increased.<sup>141</sup> It has been raised to 120,000 barrels,<sup>142</sup> but recalling Paul Gatza’s statement from 2011, this is likely only a temporary fix, the likes of which will soon need to be re-dealt with.<sup>143</sup>

### C. SOCIAL MEDIA

However, some evidence exists that the Liquor Control Commission is open to adapting to the current beer landscape. In an unusually progressive move, the Illinois General Assembly passed an amendment to the Liquor Control Act, allowing brewers and distributors to be allowed to utilize social media to advertise their product.<sup>144</sup> Prior to this amendment, a tier advertising another tier’s products or events was considered giving “something of value”

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136. Latif, *supra* note 14.

137. See Ylisela et al., *supra* note 12.

138. BEERPULSE, *supra* note 84.

139. BEERPULSE, *supra* note 84.

140. BEERPULSE, *supra* note 84. Additionally, with the world’s largest producer of beer singlehandedly brewing 29% of the world’s beer, it is questionable how the anti-monopoly aims of the laws are being met. See Saabira Chaudhuri, Shayndi Raice & Tripp Mickle, *How AB InBev Won Over SABMiller*, WALL ST. J., <http://www.wsj.com/articles/sabmiller-ab-in-bev-agree-on-deal-in-principle-1444717547> (last updated Oct. 14, 2015, 9:33 AM).

141. ST. J.-REG., *supra* note 126.

142. ST. J.-REG., *supra* note 126.

143. Gatza stated, “There may come a time when [a craft brewer] is coming up to [statutorily defined brew limits], and that’s for someone to figure out down the road.” Johnson, *supra* note 14.

144. 235 ILL. COMP. STAT. 5/6-5 (2014).

forbidden by the Act.<sup>145</sup> For example, if a brewer mentioned its distributor on a social media website, this would have been considered “something of value” in violation of the act.<sup>146</sup> Tied-house fears still prohibit full disclosure in the advertisements, but now that the amendments have passed, craft brewers can at least benefit from advertising via social media.<sup>147</sup>

This amendment to the Liquor Control Act is hopefully the first of many amendments that will level the beer playing-field for craft brewers versus big beer. Prior to this amendment, craft brewers were again disparately harmed by the interpretation of the Act. Big beer is infamous for its advertising campaigns that can cost millions of dollars apiece, particularly during special events.<sup>148</sup> Problematically, big beer has even utilized this advantage to run controversial advertisements explicitly demeaning and downplaying the relevance of the craft brewing industry.<sup>149</sup>

Large, national advertising campaigns like that are simply beyond the means of all but the biggest craft brewers.<sup>150</sup> So prior to the social media amendment, craft brewers were functionally unable to advertise beyond their brewery, brewpub, and whatever online presence was directly associated with the same (as cross-tier advertising was forbidden). Now, however, members of the General Assembly seem to have acknowledged that craft beer is not the same as big beer, and as such, the laws need to change to reflect that. As this is a relatively recent amendment, its ramifications have yet to be determined. Hopefully, the legislators will see that making concessions for craft brewers will not destroy the temperance-goals of America, but rather allow the smaller brewers the opportunity to flourish and thrive in their home

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145. See 235 ILL. COMP. STAT. 5/6-5 (2014).

146. See ILL. COMP. STAT. 5/6-5 and 5/6-6 (2014).

147. For example, the advertisement still may “not contain the retail price of any alcoholic liquor.” 235 ILL. COMP. STAT. 5/6-5 (2014).

148. Commercials during the Super Bowl, for example, cost \$8 million per minute, and have production costs exceeding \$1 million apiece. Rob Siltanen, *Yes, A Super Bowl Ad Really is Worth \$4 Million*, FORBES (Jan. 29, 2014, 2:01 PM), <http://www.forbes.com/sites/on-marketing/2014/01/29/yes-a-super-bowl-ad-really-is-worth-4-million/#61dec47e4d82>.

149. In 2015, Budweiser’s “Brewed the Hard Way” television commercial not only condescendingly depicted millennials “fussing” over their beer, but it also poked fun at the creative varieties of beers being brewed by craft brewers before emphasizing that Budweiser’s beer is “brewed the hard way” and “meant for drinking.” This shallow attack on craft brewers and drinkers caused a substantial uproar in the craft community. Duncan Macleod, *Budweiser Brewed the Hard Way*, INSPIRATION ROOM (Feb. 7, 2015), <http://theinspiration-room.com/daily/2015/budweiser-brewed-the-hard-way/>.

150. Even if expensive and conventional advertising campaigns are monetarily feasible, many craft brewers choose not to utilize them. Sam Calagione, founder of Delaware’s Dogfish Head Craft Brewery, said, “the bulk of our marketing efforts have skewed away from advertising *to* our customers and have moved toward all the new technologies that allow us to converse *with* our customers.” SAM CALAGIONE, BREWING UP A BUSINESS: ADVENTURES IN BEER FROM THE FOUNDER OF DOGFISH HEAD CRAFT BREWERY 123 (2011).

state. This could then begin to make legislators even more open to lobbying efforts on behalf of the likes of the Illinois Craft Brewer's Guild, whose efforts to promote craft-positive change have heretofore been met with considerable resistance from legislators.<sup>151</sup>

#### D. NEGATIVE DEVELOPMENTS IN BEER LAW

However, despite these changes that work to promote the success of craft brewers, the issues with distributor-abuses are only getting worse. The world's two biggest beer conglomerates, Anheuser-Busch InBev and SAB-Miller, have recently merged to become a monolithic corporation that serves one-third of the world's beer.<sup>152</sup> Though the merger was done primarily to serve international markets, it is simply another nail in the coffin for big beer only getting bigger and being better equipped to abuse the legal system surrounding breweries.<sup>153</sup> By becoming an immense corporation, Anheuser-Busch is only gaining more power, which allows it to abuse the Three Tier Distribution System, further exemplifying why the system is ineffectual.

Furthermore, big beer has been buying up craft breweries for years now. Two breweries that have substantial operations in Illinois exist under the guise of "craft brewer" that are in fact owned by big beer—Goose Island and Lagunitas, both with large breweries in Chicago.<sup>154</sup> Big beer also owns formerly-craft breweries like Elysian and Ballast Point.<sup>155</sup> The obvious reason for this is that big beer is privy to the ever-expanding success of craft breweries, and so by purchasing their competition, big beer is able to capitalize on

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151. See section IV(B) of this Article: Increasing the Barrel-Limit.

152. Tripp Mickle, *AB InBev Takeover of SABMiller Would Realign Global Beer Industry*, WALL ST. J. (Oct. 14, 2015, 3:14 AM), <http://www.wsj.com/articles/ab-inbev-takeover-of-sabmiller-would-reshuffle-global-beer-industry-1444743235>.

153. While sales of big beer brands such as Bud Light have been declining in America over the past decade, markets such as Africa and Latin America are still doing well; this merger was completed largely to capitalize on those markets. *Id.*

154. Lagunitas, which is headquartered in Petaluma, California, operates a second brewery and brewpub in Chicago, Illinois. Founder Tony Magee sold 50% of Lagunitas to Netherlands-based Heineken, citing international distribution aspirations as the motivation. Goose Island, of Chicago, has been owned by Anheuser-Busch since 2011. See Brian Solomon, *Lagunitas Brewery Sells 50% Stake To Heineken To Fuel IPA Ambitions*, FORBES (Sept. 8, 2015, 1:32 PM), <http://www.forbes.com/sites/briansolomon/2015/09/08/heineken-grabs-50-of-lagunitas-brewery-to-take-ipas-global/#1c6b5cbc3e2c> (describing the Lagunitas-sale); Devin Leonard, *Can Craft Beer Survive AB InBev?*, BLOOMBERG BUSINESSWEEK (June 25, 2015), <http://www.bloomberg.com/news/features/2015-06-25/can-craft-beer-survive-ab-in-bev-> (describing ownership of Goose Island).

155. Elysian Brewing is now owned by AB InBev, and Ballast Point is now owned by Constellation Brands (which also owns brands such as Corona and Modelo). See Robert Mclean, *Beer Bubble? This Craft Brewery Just Sold for \$1 Billion*, CNN MONEY (Nov. 17, 2015, 12:12 PM), <http://money.cnn.com/2015/11/17/investing/constellation-ballast-point-craft-brewing/>.

the growing craft-beer revolution in America.<sup>156</sup> However, this also has sobering influences on distributors—by obtaining ownership of not only big beer names, but also perceived “craft” names, big beer breweries are able to leverage their clout (that they earned through decades of profitable relationships with distributors) to further edge craft brewers off of the shelves. If a craft brewer is already in a relationship with a distributor, their beers may simply remain ignored in distributor warehouses while the distributor caters to big beer brands.<sup>157</sup> At the same time, the consumer is deceived into thinking that their local retailer actually carries true “craft” products.<sup>158</sup> Here is another instance of both the Three Tier Distribution System and Beer Industry Fair Dealing Act acting in the exact opposite ways they were intended. By expanding their leverage over distributors, big beer can either keep craft brewers out of the market entirely or keep the craft beers incarcerated in warehouses of uninterested distributors—and the Fair Dealing Act makes this possible, despite its original intentions to protect small businesses.<sup>159</sup>

These concerns have already been becoming reality for some brewers. After Anheuser-Busch bought two Oregon distributors in 2011 and 2012, the CEO of Ninkasi Brewing Company saw his treatment by those distributors degrade—sales trends dropped and “growth quickly stalled.”<sup>160</sup> No improvements were made until Ninkasi switched distributors shortly afterwards.<sup>161</sup> While Illinois law prohibits brewers from owning distributors, this sample serves to show what has already been occurring as a result of distributor-abuse—that is, craft brewers that were enjoying a profitable relationship with distributors suddenly received new, negative treatment from that distributor after big beer started exerting its muscle.<sup>162</sup>

Most problematically, Anheuser-Busch InBev is instigating a new dealer-incentive program via which distributors are monetarily rewarded for focusing their efforts on selling Anheuser-Busch’s products.<sup>163</sup> Deschutes

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156. AB InBev’s market share has fallen from 49% to 45% since 2008. Concurrently, craft beer now accounts for 10% of the market. See Mickle, *supra* note 152; see also Diane Bartz, *U.S. Probes Allegations AB InBev Seeking to Curb Craft Beer Distribution*, REUTERS (Oct. 12, 2015, 5:51 PM), <http://www.reuters.com/article/us-abinbev-doj-antitrust-exclusive-idUSKCN0S623R20151012>.

157. This is, of course, made possible by the Beer Industry Fair Dealing Act, the irony of which’s name is hopefully becoming apparent by now.

158. Christon, *supra* note 95, at 12.

159. 82d Ill. Gen. Assemb. Reg. Sess., Transcript of S. Deb. 128 (June 23, 1982) (statement of Sen. Mahar).

160. Bartz, *supra* note 156.

161. Bartz, *supra* note 156.

162. Bartz, *supra* note 156.

163. Some distributors could receive reimbursements of “as much as \$1.5 million if 98% of the beers they sell are AB InBev brands,” and distributors “whose sales volumes are 95% made up of AB InBev brands would be eligible to have the brewer cover as much as half of their contractual marketing support for those brands.” Tripp Mickle, *Craft Brewers Take*

Brewing has already been harmed by this practice, having been dropped by a distributor so it could focus more on the big beer brands.<sup>164</sup> If this incentive program is allowed in Illinois, the original intention of the Three Tier Distribution System—that is, prohibiting vertical integration of the market<sup>165</sup>—will be completely ignored. If Anheuser-Busch is allowed to essentially buy the loyalty of distributors, the separation of tiers is obliterated.<sup>166</sup> Furthermore, this makes it even more difficult for craft brewers to enter the market, keeping new businesses and employees out of the state. In 2013, Representative Leitch stated that “[i]t’s extremely important to preserve the three-tier system in Illinois. This post-Prohibition law protects consumers from the threat of large brewers controlling distribution, thereby creating vertical integration.”<sup>167</sup> The fact that this is precisely what is occurring is telling as to how problematic Anheuser-Busch’s incentive program is.

By allowing Anheuser-Busch to incentivize distributors in such a way, the Three Tier Distribution System combines with the Beer Industry Fair Dealing Act to yet again quell craft brewers and harm Illinois’s economy. Not only are craft brewers at the mercy of distributors frequently much more powerful than they are once hired, distributors might now have even less motivation to pick up craft brewers, making them dead before they’re even given a chance to live.

## V. THE ILLINOIS LIQUOR CONTROL COMMISSION

A contributing factor to the mishandling of the beer laws statewide, including the abuses in Chicago, is inadequate policing power on behalf of the Illinois Liquor Control Commission.

### A. INADEQUATE ENFORCEMENT

The Illinois Liquor Control Commission is the state entity charged with enforcing all Illinois Liquor Laws found in the Liquor Control Act of 1934.<sup>168</sup> While the laws surrounding liquor in Illinois are many, it seems that the Liquor Control Commission is most concerned with preventing minors from buying alcohol. The Commission reports conducting twenty-six thousand

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*Issue with AB InBev Distribution Plan*, WALL ST. J. (Dec. 7, 2015, 2:16 PM), <http://www.wsj.com/articles/craft-brewers-take-issue-with-ab-inbev-distribution-plan-1449227668>.

164. *Id.*

165. BEERPULSE, *supra* note 84.

166. BEERPULSE, *supra* note 84.

167. BEERPULSE, *supra* note 84 (emphasis added).

168. *What We Do*, *supra* note 109.

“routine inspections” of Illinois liquor establishments per year.<sup>169</sup> However, the results, manner, or details of these inspections is never mentioned on their website or publications.<sup>170</sup> However, they do report monthly underage alcohol sales inspections, though less than two-thousand of those were conducted statewide in 2015.<sup>171</sup> The inadequacy of these numbers is clear when one considers the number of liquor licenses in existence in Illinois. For example, in the town of Streator, Illinois, there are fifty-eight liquor licenses held in a community of fourteen thousand people<sup>172</sup>—that is one license for every 240 people. Assuming that ratio holds true statewide, that would mean Illinois has over fifty-four thousand liquor licenses currently.<sup>173</sup> The Commission reports issuing two hundred new licenses every month, theoretically adding 2,400 establishments yearly to the list requiring policing by the Commission’s twenty-four agents.<sup>174</sup> By these numbers alone, the police powers of the Commission are woefully inadequate—only 50% of the state’s licensees would have their compliance with the Liquor Control Act checked. Specific information concerning how regulations beyond the serving of minors is enforced, but is not publicly available, though the numbers published do not seem to sync.<sup>175</sup>

The issue with all of this is obvious—if enforcement of the Liquor Control Act is not regular and thorough, businesses have less incentive to play fairly. And they do not—Illinois, particularly Chicago, is infamous as a “dirty

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169. *Overview of the ILCC*, ILL. LIQUOR CONTROL COMM’N, <https://www.illinois.gov/ilcc/All%20documents%20site%20wide/Education/Forms/OverviewWeb.pdf> (last visited Dec. 21, 2016).

170. *See id.*

171. However, due to the state of Illinois’s budget, no inspections were conducted in September or October. Not enforcing liquor laws due to budget constraints is problematic, as it does not bode well for how much of a priority liquor laws are given in the state. *See* NOVEMBER UNDERAGE COMPLIANCE REPORT, ILL. LIQUOR CONTROL COMM’N (Dec. 16, 2015), <http://www.illinois.gov/ilcc/News/Documents/November2015MonthlyDisciplineReport.pdf>.

172. Derek Barichello, *All Streator Liquor Licenses Distributed*, TIMES (May 30, 2014), [http://www.mywebtimes.com/news/local/all-streator-liquor-licenses-distributed/article\\_ad5a16f1-1d87-5468-86e9-f29a4a93914d.html](http://www.mywebtimes.com/news/local/all-streator-liquor-licenses-distributed/article_ad5a16f1-1d87-5468-86e9-f29a4a93914d.html).

173. Dividing the population of Illinois (roughly 13,000,000) by 240 (the number of people per license in Streator, IL). This estimate is in line with predictable growth from the 28,000 retail establishments that existed in Illinois in 2010 (28,000 plus 2,400 new establishments per year for six years). *See* Ylisela et al., *supra* note 12, at 5 (provides the number of establishments in 2010).

174. ILL. LIQUOR CONTROL COMM’N, *supra* note 169.

175. An inquiry was made to the Education Manager of the Commission regarding what the Commission’s “regular inspections” entail; only “invoices from the past 90 days” as well as whether “distributors provide anything ‘of value’ to the retailers” was mentioned as being checked, though specific details were lacking. Furthermore, specific requests for literature regarding compliance checks and other such matters were unacknowledged. E-mail from Ted Penesis, Education Manager, Ill. Liquor Control Comm’n, to author (Dec. 28, 2015, 8:30 AM) (on file with author).



market” where tap handles are sold illegally and distributors mistreat small brewers.<sup>176</sup> However, data from 2000 to 2010 indicate that effectively none of this is caught or punished.<sup>177</sup>

## B. PROPOSED ALTERNATIVE MODELS OF ENFORCEMENT

To better police liquor laws and prevent unscrupulous business practices, the enforcing by the Liquor Control Commission should be made more analogous to the practices of other state agencies. In addition to their inadequate inspections, the Liquor Control Commission currently relies on self-report forms and submitted invoices to gather information on establishments.<sup>178</sup> Comparing that to how restaurants are inspected, for example, shows how much more stringent enforcement should and could be.

The Chicago Department of Public Health carries out “science-based inspections” of food establishments and incorporates inspections from other city entities such as the Buildings Department.<sup>179</sup> Furthermore, inspection results are made freely available online for the public.<sup>180</sup> If this model were applied to enforcing the Liquor Control Act, every third-tier establishment of the Three Tier Distribution System could be more closely monitored (by substituting employee reports, an inadequate force of agents, and the like for the “science-based inspections” of the Chicago Department of Public Health), as could the other two tiers. If each tier was independently monitored, and the results made freely available, benefits would be two-fold—extreme exposés like that in *Crain’s* would not be necessary for the public to be informed of establishment’s dealings, and craft brewers could make better-informed decisions about distributors before entering a relationship with them only to

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176. MOD. BREWERY AGE, *supra* note 55, at 4. In this interview, Koch states that “we all know the reputation of Chicago.” MOD. BREWERY AGE, *supra* note 55, at 4 (referencing unethical methods some brewers use to get into bars).

177. An investigation by *Crain’s* found that from 2000 to 2010, the Liquor Commission issued 406 fines for violations *state-wide*; cities with the most violations were Rock Island (52), Galesburg (24), and Moline (23). Chicago had nine. Ylisela et al., *supra* note 12, at 4.

178. See also E-mail from Ted Penesis, Education Manager, Ill. Liquor Control Comm’n, to author (Dec. 28, 2015, 8:30 AM) (on file with author); see also *File a Complaint*, ILL. LIQUOR CONTROL COMM’N, <http://www.illinois.gov/ilcc/Divisions/Pages/Investigations/File-Complaint.aspx> (last visited Oct. 16, 2016).

179. *Restaurant and Food Inspection Reports*, CITY OF CHI. PUB. HEALTH, [http://www.cityofchicago.org/city/en/depts/cdph/provdrs/environ\\_health/svcs/restaurant\\_food\\_inspection.html](http://www.cityofchicago.org/city/en/depts/cdph/provdrs/environ_health/svcs/restaurant_food_inspection.html) (last visited Oct. 16, 2016). This is not to say that the Health department and Liquor commission are similar enough to be interchangeable; the Health department is concerned with promoting public safety and wellbeing, whereas the Liquor Commission is concerned with promoting temperance, payment of taxes, etcetera. However, this discrepancy should not obscure the vast difference between the efficacy of their policing methods.

180. *Id.*

have the Beer Industry Fair Dealing Act work to lock them out of that market shortly thereafter. An enforcement system like this would mean a person no longer would need a “death wish” to report dirty dealings in the market, and it would make entering a distributor-relationship much safer for craft brewers.<sup>181</sup> As it stands, the Commission’s methods of enforcement are clearly inadequate to prevent such abuses.

While applying the Chicago Department of Public Health’s methods of enforcement to the Liquor Control Commission might seem a stretch, another industry, similarly structured to the liquor industry, can provide another example of how the Commission could better prevent rampant abuses of the Three Tier Distribution System.

With the industries being somewhat similarly organized, looking to Illinois’s dairy industry could provide additional inspiration.<sup>182</sup> The dairy industry is subject to heavy regulation, and some parallels exist between the aspects of the Liquor Control Act and the Illinois Grade A Pasteurized Milk and Products Acts.<sup>183</sup> For example, each makes an exception to its most important tenants with respect to small retail units.<sup>184</sup> Again, the way enforcement is carried out is where the problematic differences lie.

Perspective dairy farmers and plants are heavily monitored during every step of their business transactions, from the construction of their facilities to being permitted to operate.<sup>185</sup> Furthermore, specific statutes exist to ensure one “tier” of the operation does not interfere with the workings of another.<sup>186</sup> The Illinois Department of Public Health’s Dairy Division monitors all of

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181. Ylisela et al., *supra* note 12, at 2.

182. Comparing beer to milk is not as illogical as it seems on the surface; the original brewery created by Two Brothers Brewing included bulk milk tanks and cream tanks donated by the brothers’ grandfather, a dairy farmer, which were converted into beer fermenters and beer aging tanks. TWO BROTHERS ARTISAN BREWING, *supra* note 13.

183. 410 ILL. COMP. STAT. 635/8 (2014).

184. In an exception to its strict rules regarding forbidding the sale of unpasteurized milk, the Illinois Grade A Pasteurized Milk and Products Acts allows raw milk to be sold only on-site at the farm, similar to how the Liquor Control Act allows an exception to its strict rules preventing vertical integration by allowing breweries to own and operate brewpubs. See A. Bryan Endres, Michaela Tarr, Jody M. Endres & Nicholas R. Johnson, *Comprehensive Guide to Direct Farm Business Laws in Illinois*, ILL. DIRECT FARM BUS. (2010), <http://agroecologyandsustainableagriculture.org/wp-content/uploads/2011/06/DFB-Guide-Oct-15-2010.pdf> (describing how raw milk may be sold on farms and how it must be done so a dairy farm does not encroach on the operations of a bottling plant).

185. See 410 ILL. COMP. STAT. 635/7 (2014); 410 ILL. COMP. STAT. 635/5 (2014).

186. While the dairy industry does not have formal “tiers,” like the alcohol industry, different laws pertain to packaging plants than to farms, etcetera. As such, it is important one business does not encroach on the operations of another. See generally 410 ILL. COMP. STAT. 635/5-7 (2014).

this, ensuring compliance through routine inspections and other relatively heavy-handed practices.<sup>187</sup>

This model could effectively be applied to the beer industry. Ideally, the Liquor Control Commission could make specific divisions—either for each tier or each kind of liquor. And, if all stages of the distribution were as heavily monitored and separated, it is unlikely that unscrupulous practices like Anheuser-Busch's incentive-deal could allow vertical integration or melding of tiers. Finally, by being so thorough, the Illinois Department of Public Health's Dairy Division's enforcement allows policing of materials down to each plant's machinery—if a Liquor Control agent personally inspected retailer tap lines, it is unlikely that brewer-paid-for draft systems that appear overnight would go unnoticed (and unpunished) by the Commission.<sup>188</sup> It is not that the Liquor Control Commission is inept at enforcing the Liquor Control Act, but it simply has too much to monitor without specialized divisions of enforcement.<sup>189</sup> If agents were given specific tasks like with the Illinois Department of Public Health's Dairy Division, abuses of the Three Tier Distribution System would certainly diminish, giving craft brewers a more fair playing field.<sup>190</sup>

The regulation of restaurants and dairies is all carried out to promote the health of the public.<sup>191</sup> In this way, the association with their stringent regulation and its association to craft beer might seem tenuous. However, the Food and Drug Administration, which also has goals in protecting the public,<sup>192</sup> has impacted the beer industry in a number of ways. For example, since

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187. For example, “[a]ccess to the pasteurization control system is sealed to prevent unauthorized adjustment of the equipment after it has been calibrated by Division sanitarians.” *Food Safety—Dairy*, ILL. DEP’T OF PUB. HEALTH, <http://dph.illinois.gov/topics-services/food-safety/dairy-program> (last visited Oct. 16, 2016).

188. Ylisela et al., *supra* note 12, at 7.

189. The average percentage of incidences reported in 2015 was below 30%. *See Monthly Discipline Reports on Underage Compliance Operations*, ILL. LIQUOR CONTROL COMM’N (Apr. 18, 2016), <http://www.illinois.gov/ilcc/News/Pages/Monthly-discipline-reports-on-underage-compliance-operations.aspx>.

190. It is important to note that the Illinois Liquor Control Commission is not unique in its inadequate enforcement efficacy. The label of Grand Rapids, Michigan-based Founder’s Brewing Co.’s Breakfast Stout featured an image that was in violation of Michigan law, yet the beer was sold on store shelves in Michigan for nearly a decade before a member of the Michigan Liquor Control Commission became privy and issued a fine to the brewery. Associated Press, *Michigan Approves Beer with Baby on the Label*, FOX NEWS (Jan. 15, 2016), <http://www.foxnews.com/us/2016/01/15/michigan-approves-beer-with-baby-on-label.html>.

191. *See* CITY OF CHI. PUB. HEALTH, *supra* note 179.

192. *What We Do*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/AboutFDA/default.htm> (last updated Feb. 9, 2016).

the 1970s, the Federal Alcohol Administration Act has controlled beer labeling.<sup>193</sup> The FDA also regulates some aspects of brewery facilities.<sup>194</sup> Now, the Food Safety Modernization Act will be impacting brewers.<sup>195</sup> This will require any beer sold in a restaurant with twenty or more locations to disclose the nutritional information of the beer.<sup>196</sup> Bringing beers more in line with other foods like this has both positive and negative implications for craft brewers.

These regulations are positive because they show that more stringent regulation of the beer industry is not only possible, but underway. This could mean that stricter policing of the Three Tier Distribution System and Liquor Control Act is plausible; while the federal government could not regulate state breweries, Illinois could certainly adopt federal guidelines like it did with the dairy laws.

However, this new requirement is unfortunately yet another law that will work against craft brewers and potentially keep them out of markets. In order to obtain the information required for the mandated labels, breweries must subject their beers to scientific tests.<sup>197</sup> These analyses of beer necessary to provide labeling information can cost between a few hundred and a thousand dollars per beer.<sup>198</sup> Craft breweries brew many different beers, each with possible variants—because of this, the number of analyses a brewery would need to conduct accumulates quickly, making total compliance very cost prohibitive.<sup>199</sup> This disparately harms craft brewers similarly to how the litigation necessary to escape a distributor-agreement harms craft brewers<sup>200</sup>—big beer’s huge budgets can easily absorb the cost of both litigation and beer analyses, while both are substantially more burdensome on more financially-limited small brewers.

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193. This is why currently; ingredients are not required to be listed on beer or other alcoholic products. Peggy Binzer & Marc Sorini, *The Food & Drug Administration’s Involvement in the Brewing Industry*, MCDERMOTT WILL & EMORY LLP (Aug. 9, 2012), [https://www.brewersassociation.org/attachments/0000/9662/1208\\_powerhour.pdf](https://www.brewersassociation.org/attachments/0000/9662/1208_powerhour.pdf).

194. *Id.*

195. *Questions and Answers on the Menu and Vending Machines Nutrition Labeling Requirements*, U.S. FOOD AND DRUG ADMIN., <http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/LabelingNutrition/ucm248731.htm> (last updated Dec. 2, 2015).

196. *Id.*

197. Kristen Skovira, *FDA Requiring Nutrition Labels On Craft Beer; Deadline Next December*, DENVER ABC 7 NEWS (Dec. 14, 2015), <http://www.thedenverchannel.com/thenow/fda-requiring-nutrition-labels-on-craft-beer-deadline-next-december>.

198. *Id.*

199. Each beer a brewery would brew would require its own test. *Id.* So, a craft brewer’s India pale ale would require its own test, as would their tripels, stouts, and so on. Plus, many breweries experiment with “variants,” in which they take a popular beer and add novel ingredients to one or two batches. These too would require their own tests.

200. See prior discussion of the Beer Industry Fair Dealing Act on pages 10-14.

## VI. FORTHCOMING CHANGES THAT BODE WELL FOR ILLINOIS BEER-LAW

### A. THE ANHEUSER-BUSCH INBEV AND SABMILLER MERGER

Fortunately, it seems as if the gears have potentially begun turning to change beer-law for the better. Surprisingly, it comes as a result of the recent approval of the Anheuser-Busch InBev – SABMiller merger.

The proposed merger between the two mega brewers was initially postponed due to regulatory concerns on behalf of the United States Department of Justice.<sup>201</sup> However, on July 20, 2016, a settlement was reached in the antitrust lawsuit against Anheuser-Busch InBev, allowing the acquisition of SABMiller to go through.<sup>202</sup> The delayed merger was largely due to the Department of Justice's desire to "prohibit ABI from instituting and continuing practices and distributor-incentive programs that limit the ability and incentives of independent beer distributors to sell and promote craft and import beers."<sup>203</sup> While the merger is still ultimately "bad for both the beer industry and consumers,"<sup>204</sup> it does have its benefits. Mega beer is now under much more stringent scrutiny by the Department of Justice, so that the monolithic brewery does not commit any antitrust or antimonopoly violations. This is a victory for the craft beer community, as any future craft brewery acquisitions by ABI would need approval by the Department of Justice first.<sup>205</sup> This would ideally slow the trend of big beer buying up smaller breweries so as to capitalize on the popularity of craft beer—currently, the trend is causing some people to suspect that pre-Prohibition-style, ABI tied-houses are becoming a very real possibility once again.<sup>206</sup> Furthermore, with the Department of Justice keeping such a close eye on ABI, conceivably "wholesales, brewers and

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201. Jason Notte, *Opinion: Beating Budweiser at its Own Game Just the Beginning for Craft Beer*, MARKETWATCH (July 25, 2016, 6:55 PM), <http://www.marketwatch.com/story/beating-budweiser-at-its-own-game-is-just-the-beginning-for-craft-beer-2016-07-25>; *Anheuser-Busch InBev and SABMiller's Merger Cleared by U.S. Department of Justice*, BEERPULSE (July 20, 2016, 3:36 PM), <http://beerpulse.com/2016/07/a-b-inbev-consent-decree-with-the-u-s-doj-clearing-way-for-merger-with-sabmiller-4596/>.

202. *Anheuser-Busch InBev and SABMiller's Merger Cleared by U.S. Department of Justice*, *supra* note 201.

203. Notte, *supra* note 201.

204. Notte, *supra* note 201.

205. Notte, *supra* note 201.

206. See Karl Klockars, *Goose Island Clybourn Sold to Anheuser-Busch*, GUYS DRINKING BEER (Feb. 19, 2016), <http://www.guysdrinkingbeer.com/goose-island-clybourn-sold> (discussing the recent acquisition of Goose Island Clybourn, the last remaining Goose Island brewpub not owned by Anheuser-Busch). Klockars posits, "is it insane to imagine one day there being a chain of A-B affiliated 'tied-houses' of craft taprooms, all pouring Goose Island [...] and other A-B products?" *Id.*

even consumers have a much louder whistle to blow” should they become aware of any distributor-abuse at the hands of ABI.<sup>207</sup>

## B. THE EXPOSÉ THAT BROKE ABDI’S BACK?

However, this is all at the federal level. Surprisingly, though, Illinois might finally be confronting its inept beer-law landscape. After yet another news outlet ran a “shocking” story on how easily Illinois liquor laws can be circumvented and abused,<sup>208</sup> the Associated Beer Distributors of Illinois and Illinois Liquor Control Commission are finally paying attention. After the exposé, ABDI president Bob Myers admitted that “due to the small number of [ILCC] agents, we fear that they will not have the resources and manpower to effectively regulate the industry.”<sup>209</sup> Of course, craft brewers have been painfully aware of this fact for years. But, now that distributors are involved, the ILCC is seeking to increase funds allocated to liquor-law enforcement, possibly even bringing it to a more local level.<sup>210</sup> The next “big battles” in beer are even said to now be turning to fighting the sales of tap handles at bars and restaurants, and lobbying to change state beer-laws.<sup>211</sup> While it is frustrating that it took the merger of ABI and SABMiller and yet another Illinois liquor law scandal to bring all of this to the public’s awareness, it is at least finally happening.

## VII. CONCLUSION

While expansion of brewing limits for craft brewers has been steady, it is still slower than it needs to be. Again, the imagined threat of Prohibition-era vice and intemperance returning keeps the change slow—Bill Olson, former president of the Associated Beer Distributors of Illinois, explicitly stated that despite craft brewers wanting an increase in limits, doing so might allow “history [to] repeat itself” by allowing big beer to open tied-houses.<sup>212</sup> This of course ignores the reason for the brewpub’s desire to be exempt (at least to some small degree) from the Beer Industry Fair Dealing Act and other similar legislation.

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207. Notte, *supra* note 201.

208. Over the summer, ABC 7’s I-Team recorded multiple instances of an Indiana liquor retailer selling liquor to an Illinois liquor retailer. The third-tier to third-tier sales were of course illegal, but without ABC 7’s exposé, no one would have had any reason to suspect illegal dealings. See Ryan Hermes, *IL Liquor Control Commission Eying Fee Increases in 2016*, GUYS DRINKING BEER (Jan. 18, 2016), <http://www.guysdrinkingbeer.com/il-liquor-control-commission-fee>.

209. *Id.*

210. *Id.*

211. Notte, *supra* note 201.

212. Latif, *supra* note 14.

The interplay between the Beer Industry Fair Dealing Act, legal definitions and regulations, the Illinois Liquor Control Act of 1934, and the Three Tier Distribution System synthesizes into a complete picture what is wrong with Illinois beer laws. The Three Tier Distribution System mandates inefficiency in the system,<sup>213</sup> and the Beer Industry Fair Dealing Act codifies a way that prohibits abuses of power based on an outdated, no-longer-applicable understanding of Three Tier power dynamics. Recognizing to a small extent the issues propagated by this, legislators have slowly enacted statutes enabling craft brewers to prosper despite statutory handicaps; however, to avoid the handicaps, craft brewers must either self-inhibit their growth by keeping output within the definition of craft brewer, or lose their access to the few benefits given to craft brewers.<sup>214</sup> As Peter Crowley made clear, that is absurd—Illinois brewers are penalized for growing in their home market, thus capping the positive impact than can bring to the area.<sup>215</sup>

In a state whose economy is failing,<sup>216</sup> the problems with these statutorily-borne issues are obvious. The Three Tier Distribution System creates an environment where this rapidly expanding source of money and jobs has motivation to leave the state. Clearly, the Illinois beer-law is contrary to public policy and needs repair.

This cannot happen soon or quickly enough. The United States currently has 4,656 breweries—the most the nation has ever had (even before Prohibition), which reflects an enormous 15% increase just from the previous year.<sup>217</sup> These contribute over 120,000 jobs to the American workforce.<sup>218</sup> Just in Illinois, the craft beer industry provides jobs for over 17,000 people, creating an economic impact of over two trillion dollars in 2014.<sup>219</sup>

Unless Illinois law ceases to be mired in Prohibition-era fears, the state risks alienating more breweries like it did Schlafly and New Glarus.<sup>220</sup> If big beer is allowed to continue to exploit the system and keep getting bigger, craft breweries will likely keep finding motivation to take their malt and hops

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213. Heffernan, *supra* note 10, at 3.

214. *E.g.*, 235 ILL. COMP. STAT. 5/5-1(n) (2014).

215. Montoro, *supra* note 72.

216. Problematically, Illinois's budget is also interfering with the enforcement of one of the primary reasons for the Liquor Control Act—preventing the sale of alcohol to minors. No compliance checks were conducted in September or October of 2015. See NOVEMBER UNDERAGE COMPLIANCE REPORT, *supra* note 171.

217. Reid Ramsay, *There Are 4,656 Breweries Operating in the U.S.*, BEER ST. J. (July 26, 2016), <http://beerstreetjournal.com/breweries-in-us-june-2016/>.

218. *Id.*

219. *Economic Impact*, BREWER'S ASS'N, <https://www.brewersassociation.org/statistics/economic-impact-data/> (last visited Oct. 12, 2016) (click "Browse Data from all 50 states" link below United States map).

220. Ylisela et al., *supra* note 12, at 2-3; Noel, *supra* note 15.

to states more conducive to their success, and along with them they will take their jobs and revenue.

Illinois's beer-law hangover may finally be subsiding since it began after the repeal of Prohibition. However, "beer has shaped us as much as we have shaped it,"<sup>221</sup> so if Illinois has any hope of enticing future craft brewers to call Illinois home, and thus further capitalize on the immense growth of the craft beer industry, the state needs a systemic overhaul of its beer law as quickly and efficiently as possible.

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221. MOSHER, *supra* note 2, at 2.